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THE
FAMILY LAW OF THE CHINESE

BY
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P. G. VON MÖLLENDORFF



SHANGHAI:
Printed by KELLY & WALSH, LIMITED, Nanking Road.

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1896.

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THE FAMILY LAW OF THE CHINESE.

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FAMILY LAW OF THE CHINESE

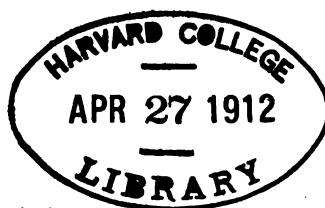
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THE
FAMILY LAW OF THE CHINESE.

PREFACE.

IN 1878 I read an essay on the Family Law of the Chinese before the North-China Branch of the Royal Asiatic Society at Shanghai, which appeared in the Society's Journal [N.S. vol. XIII (1879) p. 99-121]. I had been largely indebted to Mr. E. H. PARKER, H.B.M.'s Consul, for valuable notes relating to my subject, and in a lengthy review of my essay in the *China Review* [vol. VIII (1879) p. 67-107] that gentleman again added a number of suggestions and observations. These together with new investigations of my own have made it desirable to republish the old essay, with the necessary alterations and additions.

Of the legal literature of China I have principally consulted the Statute Law and the Ordinances of the present dynasty 大清律例 (*Ta-ch'ing-lü-li*), of which the laws relating to the present subject have been translated by Mr. G. JAMIESON in the *China Review* [vol. X (1881) p. 77-99].

In the arrangement of the subject before me I have taken as a basis the Roman law, which, owing to its logical structure and general completeness, has become a typical system, and

has formed the foundation of the jurisprudence of all European nations. I have chiefly consulted the works of PUCHTA, MACKELDEY, DERNBURG [*Privatrecht*, 2nd ed., vol. III, 1881] and others, for the Canon law WALTER's *Kirchenrecht*.

For the Jewish law the interesting work [in German] of S. MAYER on the *Laws of the Jews, Athenians and Romans*, furnished comparisons, ideas and suggestions. Since the first edition of my essay, the *Realencyclopädie für Bibel und Talmud* [by Dr. HAMBURGER, 2 vols. and 3 Supplements (1870-1892)] has become a standard work, to which I am much indebted.

Some sentences have been quoted from MAINE's *Ancient Law*, 6th ed. 1876, and from J. F. MCLENNAN's *Studies in Ancient History*, 1876, specially chapter II, p. 13 ss. I have also made use of C. N. STARCKE, *The Primitive Family in its Origin and Development*, London, 1889.

The frequent comparisons with Jewish and Roman Law have been made with the object of proving that the Chinese laws and customs are pervaded by the same spirit of common humanity as those of other ancient peoples.

I have constantly consulted the valuable *Chinese-English Dictionary* by H. A. GILES, Shanghai, 1892, and the excellent *Nederlandsch-chineesch Woordenboek* by G. SCHLEGEL, 4 vols. 1886-90. The latter is a mine of information and far too little known. The trouble of having to use it with the help of an English-Dutch pocket-dictionary is too slight to stand in the way of its general use.

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INTRODUCTION.

As in the ancient Jewish state, the family is the unit of the Chinese ; on its model the state is governed, and from the social conditions of the families the family law received its foundations. In this sense the state is called the family of the nation (國家 *kuo chia*) and prefects and magistrates are popularly styled 父母官 (*fu mu kuan*), parent officials.

The Chinese family life, with its sexual purity coupled with filial piety, has greatly contributed towards the maintenance of the Chinese nation. Everything revolves round the family as the centre, and the family circle with its natural conservatism has had a beneficial influence towards the outside world. The Chinese family life compares favourably with the somewhat too loose bonds of the occidental,—in fact, in family life China presents herself at her best.

In the Chinese mind law¹ (律例 *lü li*) and general custom (規矩 *kuei chü*) are mixed up and cannot be kept separated. A Chinese judge will always modify the rigour of the law if local usage differs from it ; and a Chinese will invariably be in favour of 情理 *ch'ing li* (the application of special circumstances) in each case. In this sense the term “family law” is to be understood not merely as a statement of the Chinese family laws (*leges*) but including also general usages, which will have to enter largely into a future codification of the Chinese law, especially private law.

Tradition tells us very little of the family life of the Chinese in antiquity. Its foundations can be clearly recognised in the classical writings ; in the *Shiking*, or Book of Odes, we even find traces of marriage by capture.

¹ Generally speaking the *lü* have been superseded by the *li*, but in the marriage laws the *lü* are still mostly in force.

The Chinese family (家 *chia*) embraces, like the Attic *οἶκος* and the Jewish *mishpachah*, all members of the same household which stand under one head or *pater familias* (家長 *chia chang*, 家主 *chia chu*, 家君 *chia chün*), without distinction, whether they have entered the family through marriage or adoption, and including servants and slaves.² It is obligatory that all members of the family bear the same family name (姓 *hsing*) as in India, Greece, and Rome.³ Even with adoption a kind of *quasi* relationship is formed.

In the oldest time of Chinese history the number of families may have been the same as the number of clans; the ancient term 百姓 *po hsing* (the Hundred Family names, the people) occurs in the *Shuking* [I, 2 and frequently].⁴ The idea that there exists a kind of relationship between families bearing the same name has lived up to the present time [see below—"Impediments to Marriage"].

Within the family the Chinese distinguish four grades of relationship, which follow according to the proximity of descent, without distinguishing thereby between consanguinity (內親 *nei ch'in*) and affinity (外姻 *wai yin*). Genealogical tables are given in the 大清律例 (*ta ch'ing lu li*), vol. I, fol. 1-6. Compare W. H. MEDHURST, *Journ. Ch. B.R.A.S.*, 1853, "Marriage, Affinity, and Inheritance in China" [see also Dr. LEGGE's *Liki*, vol. I, p. 202-209]. C. N. STARCKE [*The Primitive Family*, p. 201-3, 206, 298] discusses the different terms of Chinese relationship, but his authorities

² The Prussian *Landrecht* [I, 1, § 3] also includes the servants in the family.

³ McLENNAN, *l.c.*, p. 217.

⁴ See VON DER GABELENTZ, *Chinese Grammar*, p. 360.—S. WELLS WILLIAMS [in his *Syllabic Dictionary*, p. 1242] dates back the beginning of family names to over 3,000 years, without, however, quoting any authority in support of this statement. See also H. A. GILES, "The Family Names," *Journal Ch. B.R.A.S.*, vol. XXI (1887) p. 256. G. JAMIESON, "Note on the Origin of the Family Names," *Ch. Rev.*, vol. X. (1881), p. 89-93.

were not free from error. The Relationships are presented by G. SCHLEGEL in his *Woordenboek* [vol. I, p. 1343] in a tabular form, in which, however, the relationships by adoption are omitted, the others are given in the Tsiang-tsiu (Amoy) dialect of the lower classes. A. J. MAY has compiled a list of all relationships in the *China Review* [vol. XXI (1894), p. 15-39], which also is not quite complete and expressed in Cantonese. G. JAMIESON [*China Review*, vol. X (1881), p. 199-200] gives also a table of the 宗 kindred on the male side only.

The above-mentioned four grades of relationship, with the legal time for mourning, given hereafter, are taken from the useful little letter-writer 官鄉要則 (*huan hsiang yao tsé*, Important Rules for the Officials and the People), by LU JUN-HSIANG (陸潤庠), Shanghai, 1892, 2 vols. 16°.

1st grade.—Term of mourning three years (usually reduced to 27 months). Called 斬衰 *chan ts'ui* (mourning garments with frayed edges). *For man and wife*: the husband's parents. *For wife and concubine*: the husband.

Term of mourning one year. Called 期年 *chi nien*. *For man*: sons, wife of eldest son, grandsons (descended from wife), uncle and his wife, daughters if unmarried, brothers, sister if unmarried, nephew (brother's son), niece (brother's daughter) if unmarried. *For wife*: her parents and grandparents. *For concubine*: wife of husband, husband's parents, sons (her own and those of the wife and of other concubines). This term of one year is also kept by a man of double *sacra* (一子雙祧 *i tzu shuang t'iao*) on the death of his own parents.

Term of mourning five months. Called 齊衰 *tsü ts'ui* (mourning garments with unhemmed, but even cut edges), with the addition 杖期 *chang ch'i*, i.e. in the lifetime of the parents. *For man*: the great-grandparents, the great-great-

grandparents, the grandparents, the wife. If the parents are already dead, the term of mourning is only three months (不杖期 *pu chang ch'i*). *For wife*: her great-grandparents and great-great-grandparents.

2nd grade.—Term of mourning nine months. Called 大功 *ta kung* (the greater merit). *For man*: the wives of sons (others than the eldest), grandsons (others than from first wife), married daughters, male and (unmarried) female cousins (children of paternal uncle), married sisters, wife of nephew (son of brother), married nieces (brother's daughters). *For wife*: husband's grandparents, husband's uncle, husband's daughter-in-law (wife of a younger son or of a concubine's son), husband's nephew's wife, husband's married niece, grandsons.

3rd grade.—Term of mourning five months. Called 小功 *hsiao kung* (the lesser merit). *For man*: grandson's wife, granduncle (brother of grandfather) and his wife, unmarried grandaunt, granduncle (son of great-granduncle) and his wife, brother's wife, male cousins (of the same surname), married female cousins (daughters of elder paternal uncle), unmarried female cousins (of the same surname), nephew and unmarried niece (grandchildren of paternal granduncle), son and unmarried daughter of nephew (brother's son), mother's parents, mother's brother, mother's sister. *For wife*: husband's aunt, husband's brother and the latter's wife, husband's sister, husband's second cousin, unmarried female second cousin of husband, husband's grand nephew and unmarried grand-niece.

4th grade.—Term of mourning three months. Called 緇麻 *ssü ma* (coarse hemp garments). *For man*: wives of grandsons, grandsons of more distant relations, the married female relations which come under the 3rd grade if unmarried, the wives of relations of the 3rd grade, etc. etc.

For a complete list of all relationships and to illustrate the five kinds of mourning (五服 *wu fu*) seven tables would be required :—

- 1.—A man mourning for his kinsfolk.
- 2.—A „ „ „ „ mother's kinsfolk.
- 3.—A „ „ „ „ wife's „
- 4.—A wife „ „ „ her husband's „
- 5.—A married woman mourning for her own kinsfolk.
- 6.—A concubine mourning for her husband's „
- 7.—Mourning for step-fathers and fathers by adoption and for step- and foster-mothers.

Tables 1 to 6 are printed in English in LEGGE's *Liki* [vol. I, p. 209].

Slaves (奴才 *nu ts'ai*) are also counted as belonging to the family; under the name of 家身子 *chia shên tzü* are designated those which have been bought; 家生子 *chia shêng tzü* or 家產子 *chia ch'an tzü* are those born in the family, children of slaves, *vernae*, *oistrai*, and the Jewish *yelid bayith* (Jerem., 2, 14). Slaves are generally well treated, and their position in the family is more like that of the Jewish *ebed*, not like that of the slaves amongst the Greek and Romans.⁵

The Chinese master may punish his slave, but not excessively. In ancient times criminals were made slaves as a punishment (官奴 *kuan nu*, slaves of the state).⁶

The Manchu family names are not publicly known. The Manchus, whose Emperors reign over China since 1644, do not use their family names (姓 *hsing*, Manchu: *hala*) since the reign of the Emperor KANGHI (1662-1723), but only their personal names (名 *ming*, Manchu: *gebu*). The surnames are, however, known within the clans, and the law concerning them is, with some modifications to be indicated later on, the same for the Manchus as for the Chinese.

⁵ E. J. EITEL, "Slavery in China," *Ch. Rev.*, vol. X (1881), p. 283-284.

⁶ *Liki*, XXXVI, 48, LEGGE, vol. II, p. 363.

A.—ON MARRIAGE.

1.—GENERAL.

The ancient Roman conception of marriage was “*uxorem habere liberorum quærendorum causa*,” and the same one-sided view was accepted by the so-called “enlightened epoch” of last century, seeing in marriage nothing but the aim for the procreation and bringing-up of children.

Fundamental institutions like marriage cannot be defined, but can only be approximately described. Better than the old conception is the definition given in l. 1 *D. de ritu nuptiarum*, 23, 2: “*nuptiæ sunt conjunctio maris et feminae, consortium omnis vitæ, divini et humani juris communicatio*.” The sentiment is here decisive, and as the means at the disposal of law have little influence of the sentiment, the influence of law over marriage can only be a limited one.

The highest moral standpoint was reached by the Jews, who took marriage as “covenant” [Mal., II, 14] to which God is a witness.

How and when marriage became a recognised institution with man is perhaps an idle question. Some take it that the communion of women in prehistoric times had to be conquered by the exogamous marriage by capture, and that the later endogamous marriage by capture formed a transition stage towards marriage by contract.⁷ Others again deny that primitive man ever lived in promiscuous intercourse. C. N. STARCKE⁸ quotes DARWIN [*Descent*, II, p. 362] and MAINE [*Early Law*, p. 206, 216]:—“It is improbable that sexual intercourse was ever

⁷ H. PAUL, *Grundriss der Germanischen Philologie*, vol. II, 2, p. 142.

⁸ *The Primitive Family*, p. 242.

perfectly free, since the passion of jealousy is so strong in the whole animal kingdom that it cannot be supposed to have been dormant in primitive communities of men."

Of the primitive condition of the Chinese, when the founders of the Chinese empire entered in the north-western part of China, we know next to nothing. Previously to the Chou dynasty (1122-255 B.C.), according to the commentators of the *Shiking*, a general laxity of morals prevailed, and it was not until the Chous laid down proper rites regulating marriage that promiscuous intercourse (淫奔 *yin pen*, lewdness) ceased. But this judgment of the modern commentators is altogether unjust, and has no other foundation but the wish to excessively glorify the Chous. According to our idea the home life as depicted in the *Shiking* is a moral and happy one; it may be contrary to the present Chinese ideas of a life surrounded by all sorts of rites and usages, but it is altogether decent and morally irreproachable.

"By the united action of heaven and earth all things spring up," says the *Liki* [LEGGE, vol. I, p. 439], "thus the ceremony of marriage is the beginning of a [line that shall last for a] myriad ages." The importance of marriage is thus emphasized [*Liki*, vol. II, p. 264]:—"Marriage is the union of the representatives of two different surnames in friendship and love, in order to continue the posterity of the former sages, and to furnish those who shall preside at the sacrifices to Heaven and Earth," and [p. 266]:—"Yes, the ceremony of marriage lies at the foundation of Government."

Marriage is thus regarded by the Chinese as necessary and indispensable,⁹ and the best proof of this is furnished by the fact that, excluding priests and nuns who are not allowed

⁹ Two proverbs express it: 大禮有三千婚姻最重 *ta li yu san ch'ien, hun yin tsui chung* (Of the 3,000 rites marriage is the most important), and 寧可成一房不可敗一戶 *ning k'o ch'eng i fang, pu k'o pai i hu* (Better establish a home than cut off one).

to marry, it is scarcely possible to find an old bachelor, and an old maid is a rarity.

Chinese law further recognises the importance of marriage by giving a long list of marriage laws.¹⁰ We must add, however, that marriage is not absolutely compulsory, nor is celibacy punished, as was the case under the Jewish law and the Attic code of Solon.¹¹

The Chinese distinguish between two kinds of marriage which, not incorrectly, may be termed *connubium* and *concubinatus*. In the first case they are obliged to be content with one wife¹² (妻 *ch'i*), who, like the Jewish and Roman, unlike the Greek, wife, shares the rank and honour of the husband. This wife is almost invariably chosen by the *pater familias*¹³ from a family of equal position and circumstances; but the latter is not a *conditio sine qua non* and the requirement of equality of rank which led in Europe during the Middle Ages to the absurdity of marriages on the left hand (*matrimonium ad morganicam*)¹⁴ has been almost unknown in China. The wife is generally a woman with small feet.

Concubinage is, however, at the same time permitted, and marriage with several concubines (妾 *ch'ieh*) is allowed. The number of these, besides the one wife, is not limited by law, but only one wife is permitted.

The better classes do not give their daughters to a man already married; Manchu girls are not allowed to become concubines.

¹⁰ G. JAMIESON, "Translations from the *Lü-li*, or General Code of Laws," *China Review*, vol. VIII, vol. IX, vol. X, p. 77-99 (the Marriage Laws).

¹¹ Among the Israelites each man was obliged to marry, and could be forced by the authorities to fulfil his duty until he had a son or a daughter; compare *Pollux*, III, 48; VIII, 40 (MAYER, *l.c.*, vol. II, p. 286).

¹² Like the Romans, § 7 *J. de nuptiis*, 1, 10.—1. 2 *C. de incestis et inutilibus nuptiis*, 5, 5.—1. 1 *D. de his qui not. inf.* 3, 2.—There is an exception when a man is a *filius familias* for two families [see below under "Adoptions"].

¹³ As in Biblical antiquity, Gen. 24, 21; Exod. 21, 9.

¹⁴ In Germany finally abolished by Reichsgesetz of 6th Feb. 1875.

Whilst the marriage with the wife (妻 *ch'i*) is concluded by the parents of the two parties, the man is allowed to choose the concubines himself. These may be of low rank, even slaves, and have, without regard to priority of marriage, equal rank among themselves, but are subjected to the authority of the wife.

The husband has not the right of degrading his wife, without sufficient reason,¹⁵ to the rank of a concubine, nor of raising a concubine to the rank of a wife whilst the wife is alive.

The wife is considered the mother of all the children born in the family¹⁶ and is honoured by the latter as their mother.

The reason for the greater number of marriages with concubines is barrenness of the wife.¹⁷

2.—REQUIREMENTS FOR CONCLUDING MARRIAGES.

A.—*Absolute Impediments to Marriage.*

The attainment of puberty required by the Roman¹⁸ and Canon¹⁹ law, of a certain age, as prescribed by modern legislation, as a pre-requisite for concluding marriage, is not known to Chinese law. It is, however, an established custom, that men marry when over twenty years of age, and that girls are rarely given in marriage before their fifteenth year. But as there are many exceptions in the laws in favour of persons

¹⁵ See below, "Impediments to Marriage."

¹⁶ The same in Jewish law [see MAYER, *l.c.*, vol. II, p. 339] and in Mohammedan law [see G. ROSEN, in *Ztschrift D. M. G.*, vol. XXII, p. 543].

¹⁷ This is probably the case with all polygamic peoples.—The ancient Jewish custom was [MAYER, *l.c.*, vol. II, p. 339]—as it was considered a disgrace to have no children—the wife in such case induced her husband to take a maid-servant as concubine, the children born by the latter were considered hers and she was no longer childless.

¹⁸ *Pr. J. de nuptiis*, 1, 10.—1. 14, *D. 23*, 1.—1. 4 *D. 23*, 2.

¹⁹ *Tit.*, X, 4, 2 *Lib. sent. Decret.*, 4, 2.

under fifteen years of age, we may consider the latter as the age required for marrying. Very early marriages are not as common in China as is generally believed: the common practice is to provide early in life a suitable wife for the son and a husband for the daughter, and to marry them when their character is formed.²⁰ In China puberty commences at the same age as in Europe. The old idea that puberty arrives earlier in hot than in temperate climates is exploded by modern investigations.

Suitability of age is generally recommended, as also that a young girl should not be married to an old man.²¹ But an early marriage in China is understood in the sense of an early settlement in life.²²

Non-attainment of puberty, disease, or other defects (as insanity, deafness and dumbness, etc.) are considered impediments, if no notice of them has been given in the marriage contract.

The defect of eunuchs naturally debars them from marrying. The right of having eunuchs (太監 *t'ai-chien*, 老宮 *lao-kung*) is an Imperial prerogative, and is also granted to the highest members of the Imperial family. It is also a prerogative of the king of Corea, who ranked with, but before, Imperial princes of the 1st order (親王 *ch'in-wang*). As eunuchs have to serve and to live in the palace (內官 *nei kuan*), it is for this reason alone impossible for them to marry.²³

There are, however, eunuchs at Peking who had children before their mutilation and who may obtain permission to visit their families from time to time. Cases may occur

²⁰ Cp. Sirach, 7, 27; 42, 9-10.

²¹ The same in the Talmud.

²² Compare the German proverb "jung gefreit, hat keinen gereut."

²³ See *Shiking*, I, 11, 1 and II, 5, 6 [LEGGÉ, vol. III, p. 157 and 239].

where a eunuch, who by intrigues in the palace has risen to a position of honour, takes a wife *pro forma* and adopts a son for the succession.²⁴

B.—*Relative Impediments.*

1.—On Account of Relationship.

Marriage between relations of all grades of agnatic relationship is prohibited; "cognates cannot marry any one of the generation above or below, but may marry any one of the same generation, not being agnate."²⁵ For the relationship by adoption the prohibition does not remain in force after the first adoption has been dissolved by a new one.²⁶

It may be here observed that there exists in China no relationship between the husband and his wife's sister, as is the case according to the Canonical, and after it the English law.²⁷ In fact, since the Emperor SHUN married the two daughters of YAO [2357–2255 B.C.],²⁸ such marriages are of frequent occurrence in China, probably because a wife finding that a concubine will be taken prefers to share the affection of her husband with her sister rather than with a stranger.

²⁴ See G. C. STENT, "Chinese Eunuchs," *J. of N.C.B. of R.A.S.*, vol. XI (1877), p. 143.

²⁵ G. JAMIESON, *l.c.*, vol. X, p. 82.

²⁶ This was contrary to Roman law.

²⁷ Based, as far as I can see, on Lev., 18, 18: "neither shalt thou take a wife to her sister to vex her, beside the other in her lifetime;" which can only apply to marrying two sisters at the same time, and not to marrying the sister after the wife's death.

²⁸ *Mengtzu*, V, I, 4 [LEGGE, II, p. 220]. From the *Liki* [vol. I, p. 132] it would appear that SHUN had three wives.

Altogether, there is no relationship between the relatives of the husband and those of the wife (called 姻親 *yin-ch'in*).

Relationship is always implied by the fact of bearing the same family name:—同姓不爲婚姻 *t'ung hsing pu wei hun yin* (those of the same family name do not intermarry).²⁹ Considering that for a population of 400 millions only about 438³⁰ family names exist, this impediment appears severe in the highest degree. In the course of ages³¹ it happened that whole communities were composed of people with the same surname, so that men desirous of marriage had to look elsewhere for wives, and often to undertake for this purpose expensive voyages. Where a surname has two distinct origins, persons of the same surname may intermarry, provided that their line of ancestry can be traced from the separate stock, 同姓不同宗 *t'ung hsing pu t'ung tsung* (of the same surname but of different ancestry),³² e.g. persons of the name of 車 *ch'ê*. On the other hand, families of the same ancestry have branched off under a different name and do not intermarry, as 徐 and 余, both pronounced *hsü*, who were one family until the reign of YUNG-CHÊNG [1723-36].³³ It is the same with 沈 *ch'ên* and 葉 *yeh*, and with 楊 *yang* and 易 *yi*. An expedient to mitigate this

²⁹ Endogamic marriage is excluded. In the *Institutes of Manu* it is laid down that a "twice-born" man (*i.e.*, one belonging to the sacerdotal, military, or commercial class [*Manu*, X, 4]) might elect for nuptials "a woman not descended from his paternal or maternal ancestors within the sixth degree and who is not known by her family name to be of the same primitive stock with his father" [*see* MCLENNAN, p. 84].—The American Indians profess to consider it highly criminal for a man to marry a woman whose *totem* (family name) is the same as his own, and they relate instances where young men, for a violation of this rule, have been put to death by their own relatives [*see* MCLENNAN, p. 97; C. N. STARCKE, p. 32].—The Australians are also divided into branches (*murdoos*), within which marriage is forbidden.

³⁰ 408 simple and 30 double ones [*see* H. A. GILES, "The Family Names," *J. of N.C.B. of R.A.S.*, vol. XXI (1887), p. 256].

³¹ The prohibition occurs in books as early as the *Tso chuan* (左傳) and the *Lun yü* (論語).

³² H. A. GILES, *l.c.*, p. 256.

³³ H. A. GILES, *l.c.*, p. 265, 283.

law has also been found. During the reign of YUNG-LO [1403-25] those families who took part in the grain transport were called military families (軍家 *chün chia*), the others being called families of the people (民家 *min chia*). Since that time the distinction between 軍 *chün* and 民 *min* has been maintained, and marriages between a *chün* and a *min* family bearing the same surname are permitted,—almost the only exception to the above-mentioned prohibition.

Amongst the Manchus, Mr. PARKER says, cousins descended through male ancestors and having the same surname may intermarry after the fifth generation; but I have not been able to verify this statement.

It will thus be seen that in China, as throughout America and Australia, the clan is exogamous, that is, marriage within the clan is forbidden.³⁴

2.—On Account of Affinity.

Marriage is not allowed with sisters of the wives of ascendants or descendants, with the father's or the mother's sister-in-law, or with the sister of the son-in-law.

Further, marriage is forbidden with the step-daughter and with female relations within the fourth degree of relationship,³⁵ with a widow of a relative of the fourth degree, or with the sister of the widowed daughter-in-law. Marriages with widows of relatives of a nearer degree are considered incestuous.

Decapitation is the punishment of marriage with the father's or grandfather's former wives,³⁶ or with sisters of the father.

³⁴ C. N. STARCKE, *l.c.*, p. 44.

³⁵ As in Canonical law, cap. 8, X, 4, 14; WALTER, *Kirchenrecht*, § 310.

³⁶ Reuben lost his right of primogeniture for such incest [Gen., 35, 22].

Whoever marries his brother's widow is strangled.³⁷ The re-marriage of the childless widow to her deceased husband's brother, the so-called levirate,³⁸ was of common occurrence with many nations in ancient times³⁹ and is still in vogue in the Caucasus.⁴⁰ Among the Jews this custom existed before Moses, but was confined to the case of the widow being childless [Deut., 25, 7].

In China, as already mentioned, the levirate is prohibited, but some assert that the Mohammedans in Peking practise it, and that it also occurs in the district of Huai-an in the province of Kiangsu. A writer in the *China Review* [vol. X (1881), p. 71] asserts its practice for the provinces of Kiangsi, Hupeh and Szechuan. I have not been able to find the slightest trace of it, and it can never be of the same importance with the Chinese as with other people (*e.g.* to keep the family property), as posthumous adoption, the Chinese substitute for it, fully meets the object.⁴¹

3.—On Account of other Reasons.

To marry during the legal time of mourning is prohibited [see above, p. 7].

Marriage with concubines is, however, not punished in this case, unless either the bride or the bridegroom is in

³⁷ Decapitation, *i.e.* mutilation of the body, is a heavier punishment than strangulation.

³⁸ Or the dispensation from it through the ceremony of taking off the shoe (*chaliza*) of the Jews [Deut., 25, 7; Ruth, 4, 7].

³⁹ In India [BOHLEN, *Indien*, vol. II, p. 182], Persia [KLEUKER, *Zendavesta*, vol. III, p. 226], the Gallas [BRUCE, *R.*, II, p. 228], and many other peoples [see G. N. STABCKE, *l.c.*, p. 165]. It existed amongst the Huns and in ancient Corea [see E. H. PARKER in *Transact. of As. Soc. of Japan*, vol. XVIII, part II (1890), p. 169].

⁴⁰ BODENSTEDT, *Die Völker des Kaukasus*, p. 82.

⁴¹ G. JAMIESON [China Review, X, p. 83] says: In view of the severe penalty for it, it is scarcely possible that the levirate can be practised in any part of China.

mourning for a parent, or the bride for her late husband,⁴² even if the marriage had never been consummated. It is considered to be a time of mourning for children or grandchildren if father or mother or grandparent is confined in prison for a capital offence. In accordance with the principle of Chinese marriage—*i.e.*, that the *pater familias* makes the marriage contract,—marriage is in this case permitted if the head of the family in prison gives his assent. The usual ceremonies and festivities are, however, to be omitted.

Marriage is forbidden with a woman who has committed a crime and has fled for fear of punishment. In this prohibition is included marriage between an adulteress and her seducer.⁴³

Whoever forces the wife or daughter of a free man to marry either with himself or with a son, grandson, younger brother, or nephew, *i.e.*, with a *filius familias*, is to be strangled.

According to Roman law marriage could not be concluded between persons who stood to each other in the relation of guardianship, as *tutor* and *pupilla*.⁴⁴ In China these are near relations, as only relatives or adoptive parents are able to exercise the right of guardianship and to acquire through it the *patria potestas*. A runaway female slave is not allowed to marry, as she can be lawfully given into marriage by no one except her master.

Popular opinion is against a widow (寡婦 *kua-fu*) marrying again. The *Liki* [LEGGE, vol. I, p. 439] says:—“Once mated with her husband, all her life she will not

⁴² The same as in Roman law, according to which widows and their new husbands were punished if remarried before the end of the time of mourning [l. 1, 11-13, *pr. D. de his qui not. inf.*, 3, 2.—*Const.* 2, C. 5, 9].

⁴³ Also prohibited by Roman law [l. 26, *D. de ritu nuptiarum*, 23, 2.—l. 13, *D. de his quæ not. inf.*, 34, 9.—l. 29, § 1, *D. ad legem Jul. de adult.*, 48, 5.—*Nov.* 134, *si quis autem*, c. 12]; also by Attic law [l. 11, § 11, *D. ad leg. Jul. de adult.*, 48, 5], and by the Jews [MAYER, *l.c.*, vol. II, p. 320].

⁴⁴ l. 66, *D. de ritu nupt.*, 23, 2.—C. 5, 6.

change, and hence, when the husband dies, she will not marry again." If after the death of her husband she remains under the power of her husband's father or brother, whose power over her is, however, of the slightest, she will be prevented by them from tying a new matrimonial knot. There are even cases in which a widow instead of remaining in the family of her former husband successfully repudiates any connexion with it and disregards its wishes. The proverb expresses the popular mind in this respect: if heaven wants to rain or your mother to marry again, nothing can prevent them (天要下雨娘要嫁無法可制 *t'ien yao hsia niang yao chia wu fa k'o chih*). It is, however, not considered decent for a widow to marry again, and one who refuses all offers in this respect (or who does not want to add another fiddle-string 沒心續弦 *mei hsin hsü hsien*) may receive for her faithfulness an imperial reward in the form of a gateway (牌坊 or 樓 *p'ai-fang* or *p'ai-lou*), which is erected in the place where she lives. After the bestowal of such reward she is not allowed to change her mind.⁴⁵ Should the head of the family try to force her into a new marriage, she is not obliged to obey. If she commits suicide—the common expedient of the unprotected female in China—the head of the family is punished. If, however, the marriage be concluded, she shall live with her new husband, the marriage presents, or rather the purchase-money paid for her, being forfeited.

It is a rule that, in order to secure greater impartiality, officials cannot hold office in their native province. For the same reason they are not allowed to marry a woman

⁴⁵ It was considered decent, according to the national feeling of the Romans, that a widow should remain single. *univira* meant the same as *castissima*. Such a one was highly esteemed and received the wreath of chastity [*Val. Max.*, II, c. 1; *Prop.*, IV, eleg. 12; *Puchta*, *Inst.* III, p. 177].—The Jews, on the contrary, were much in favour of a second marriage of young widows [*MAYER*, *l.c.*, vol. I, p. 322].

under their jurisdiction, or out of a family that has an interest in the performance of their official duty. An official who is related to one of the parties is not even allowed to sit as judge.⁴⁶

On account of inequality of rank, marriages between officials and actresses or singing girls are not allowed. Such marriages are also forbidden to the sons or grandsons of nobles with hereditary rank (*disparagium*, *mésalliance*), the punishment in such cases being degradation to a lower class of nobility and eventually loss of it.⁴⁷

A widow of a man of rank may not remarry.

Buddhist priests (和尚 *ho-shang*) and nuns (尼姑 *ni-ku*), and those Taoist priests (道人 *tao-jen*) and nuns (道姑 *tao-ku*) who do not shave their heads, but bind the hair in a net or head-band (網巾 *wang-chin*⁴⁸), are not allowed

⁴⁶ A similar thought prohibited in Rome marriage between a *præses provinciae* and a woman of his province [L. 57, *pr. D. de ritu nupt.*, 23, 2.—*Cod. Theod.*, 3, 11.—*Cod. Just.*, 5, tit. 2, 7].

⁴⁷ There are in China 9 classes of hereditary nobility: 5 爵 (*chio*) and 4 尉 (*yü*). The 5 *chio* are: 公 *kung* duke, 侯 *hou* marquis, Fürst (often called marquis), 伯 *po* count or earl, 子 *tzü* baron, 男 *nan* baronet. When the nobility conferred is not "hereditary in perpetuity" (世襲罔替 *shih hsi wang t'i*), each descendant takes one rank lower than his father; so that the son of a *kung* becomes *hou*, the son of a *hou* becomes *po*, and so forth, nobility ceasing altogether with the son of a *tzü*. The 4 *yü* are military nobility.

In Corea the nobility is divided into four political parties (四色 *ssü sä*, Cor. *sa säk*). These were formerly called 北人 *pei jen*, Cor. *puk in* (northerners), 南人 *nan jen*, Cor. *namin* (southerners), 東人 *tung jen*, Cor. *tongin* (easterners), 西人 *hsi jen*, Cor. *sie-in* (westerners). After splitting into factions they are now called (1) 老論 *lao-lun*, Cor. *noron*, the most powerful party, a branch of the former 西人 *sie-in*, (2) 南人 *namin*, the largest, which has completely absorbed the 東人 *tongin*, (3) 小論 *sioron*, the inconsiderable remaining portion of the 西人 *sie-in*, which at present has joined the *noron*, (4) 小北 *siopuk*, the only remaining branch of the *pukin* and in league with the *namin*.

The members of each party do not intermarry with those of another.

⁴⁸ The old Chinese fashion, still in use in Corea [called *man-ken*].

to marry. Only Taoist priests (道士 *tao-shih*, or 門祝 *mên-chu*) who shave their head and plait their hair like other Chinese, in fact lay brothers, may marry.

A priest who obtains a woman under the pretence that she shall marry another, and who then marries her himself, is severely punished.

Marriage is impossible between male slaves and free women.⁴⁹

Any impediment to marriage renders the marriage already concluded null and void;⁵⁰ the *impedimenta* are always *dirimentia*. Ignorance of them exempts the parties from punishment, but the marriage is dissolved. In accordance with the sense of the marriage contract the parties who signed it are punished if the marriage laws are transgressed, the go-between only if he was aware of the illegality; but husband and wife are not punished unless they are *sui juris*. If the father, grandfather, or uncle signed the contract, they alone are punished; if it was another relation, he is punished as principal, and husband and wife as accomplices. The purchase-money is in each case forfeited, except when the parties were ignorant of the existence of of the impediment.

A dispensation in cases of impediments to marriage is not admissible.⁵¹

In China difference of religion has no influence upon marriage.

⁴⁹ According to the laws of the Lombards, parents had the right of killing or selling their daughters, if they married one in socage [MAYER, *l.c.*, vol. II, p. 301]; in earlier times marriage between a free woman and a slave was not sanctioned, and the slave was put to death if he took the free woman by force [GRIMM, p. 324. See C. N. STARCKE, *l.c.*, p. 106].

⁵⁰ As in the time of JUSTINIAN [§12, *J. de nuptiis*, 1, 10; C. 5, 8]. Modern legislation distinguishes between *impedimenta juris publici* which render a marriage null and void—*e.g.*, incest, bigamy, and adultery—and *impedimenta juris privati* which make the marriage invalid, if only private interests are involved.

⁵¹ Also unknown to the Jews [see MAYER, *l.c.*, vol. II, p. 315].

The law says⁵² that it is forbidden to intermarry with some of the savages; but this is not carried out in practice. In Formosa the Chinese constantly intermarry with the savages; that is to say, arriving singly they readily take savage girls as wives, chiefly from the settled tribes (熟番 *shu-fan*), who have adopted Chinese surnames.

3.—BETROTHAL.

A.—*The Contract.*

The mutual promise of marriage formed with the Romans an act of social and moral importance as a preparation for marriage. In China the parties concerned are not the principal ones. The conclusion, however, of a *justum matrimonium* has to be preceded by a contract,⁵³ in which the amount of presents (*arrhæ sponsalitæ*) and the latest day for concluding the marriage are fixed. When made, the contract, if in writing (禮書 *li-shu*), is signed by those persons in whose *patria potestas* bridegroom and bride stand; the latter never sign it, unless both have no older relations. This last condition, and the fact of the son holding office, being the only cases in which a *filius* or a *filia familias* becomes *sui juris*. This is the chief distinction between the Chinese and the Roman marriage.

Before the contract is signed presents are sent to the family of the bride (納彩 *na-tsai*, in common parlance 落定 *lo-ting*, giving of earnest). Then cards, with the names, birthdays, etc. inscribed thereon, are exchanged (通庚 *t'ung-*

⁵² G. JAMIESON, *China Review*, X, p. 88.

⁵³ Known by the Romans [*l. 2, D. de sponsalibus*, 23, 1] and by the old German law [EICHORN, *Rechtsgeschichte*, §54, §183, §321].

kêng, spoken of as 問名 *wên-ming*, asking of names). When the parties are satisfied with all this, agreement is expressed by sending proof (納徵 *na-chêng*, commonly called 文定 *wên-ting*, settling the language), when the contract (禮書 *li-shu*) is exchanged.

Thus the *animus matrimonii*, the intention of husband and wife to form a connexion for life, can, with the above-mentioned exceptions, have no place in China. In Rome the assent of the *pater familias* was required, but could only be refused for special reasons; husband and wife, however, were allowed free choice. Among the Chinese the heads of the families alone choose, and the inclination of the principal parties is never consulted.

If the son is absent from home, or if by mere chance a love match does happen, the assent of the parents has to be obtained: 娶妻如何必告父母 *ch'ü ch'i ju ho? pi ku⁴ fu mu* (how do we proceed in taking a wife? announcement must first be made to our parents).⁵⁴ [*Shiking*, I, VIII, Ode VI, 3.]

The preliminary negotiations are carried on by go-betweens (媒人 *mei-jen*, 媒媾 *mei-kou*, 中人 *chung-jen* and 媒婆 *mei-p'o*), who, mostly women, form an important part in the whole transaction. Male and female, says the *Liki* [vol. I, p. 78, LEGGE], without the intervention of the matchmaker, do not know each other's name. Although the proverb asserts that nine out of ten go-betweens are swindlers (十媒九誑 *shih mei chiu k'uang*), still as without clouds in the sky it cannot rain, so without go-betweens a match can never be made (天上無雲不下雨, 地下無

⁵⁴ Emperor SHUN married without thus informing his parents, fearing they might prevent him from doing so [*Mengtzu*, IV, XXVI, 2. LEGGE, II, p. 189]. He considered that obtaining posterity was the higher duty.

媒不成親 *t'ien shang wu yün pu hsia yü, ti hsia wu mei pu ch'eng ch'in*).⁵⁵

Before the signature of the contract by the heads of the families, both parties convince themselves of the truth of the statements regarding the persons of the bride and the bridegroom, that they are sound in body and mind, and that they are not older than stated. The festivities of the betrothal then commence. As lies in the nature of the case, the age of the betrothed parties—except that it be too great—is of no consequence.⁵⁶ It often happens that a betrothal is entered upon by friendly families at a time when bride and bridegroom are not over three or four years of age. The betrothal of unborn children is forbidden.

B.—Effects of Betrothal.

The contract of betrothal gives both parties a right to sue for the conclusion of marriage.⁵⁷ The party who refuses to keep the contract is punished with fifty blows, and the court enforces the marriage. Where the contract

⁵⁵ Other proverbs are: 娶妻如何匪媒不得 *ch'ü ch'i ju ho, fei mei pu tê*, how is it taking a wife? without go-between it cannot be done [*Shiking*, I, VIII, Ode VI, 3-4. Compare *Liki*, I, 78, LEGGE, II, p. 297]. Or 娶必通媒 *ch'ü pi t'ung mei*, marriage must be negotiated through a go-between.

The Jews also use go-betweens (*shadchân*), the Greeks had female go-betweens *προμνηστριαί*; in Rome a *nuptiarum conciliator* was similarly employed, who, if present at the marriage, was called *auspex nuptiarum*.

⁵⁶ Compare the Roman law [I. 14, *D. de spons.*, 23, 1]: in sponsalibus contrahendis aetas contrahentium definita non est, ut in matrimoniis—si non sint minores quam septem annos.

⁵⁷ The same according to the Canonical, but not according to the old Roman law [I. 2, §2, *D. de divers. repud.*, 24, 21; I. 2, *D. de spons.*, 23, 1; I. 134, *D. de verb. obl.*, 45, 1; Const. 2, *C. de inutil. stipul.*, 8, 39. It was not until the time of the Christian Emperors that loss was entailed by repudiation without proper cause [I. 5, *C. de spons.*, 5, 1]. Compare the English breach of promise cases.

is not made in writing, the acceptance of presents is taken as proof of the agreement.⁵⁸

The betrothal may even be maintained if the family of the bride enters into a second betrothal;⁵⁹ and only in case the family of the first bridegroom waives its claim may the bride marry the second bridegroom. The presents are in this case to be returned.

A forcible abduction of the bride before the time fixed for the marriage is punishable, as is also any delay on the part of the bride's family beyond that time.⁶⁰

A singular situation arises if a *filius familias* is betrothed during his absence from the family, his grandfather, father, uncle or older cousin, *i.e.*, a person in whose *potestas* he stands, having, in the meantime, chosen a bride for him, and having signed the contract. If the son has married, the betrothal made by the head of the family is dissolved. Otherwise the contract made by his family takes precedence over the one made by himself.

c.—*Dissolution of the Betrothal.*

If after signing the contract it appears that false statements have been made by the family of the bride, then the contract is void, the presents are returned, and the *pater familias* of the bride receives eighty blows. The punishment for a like fraud on the part of the bridegroom's family is more severe, and the bride keeps the presents. Should the

⁵⁸ In ancient times the Jews celebrated betrothal and marriage at the same time; considerably later, in the 3rd century A.D., the betrothal consisted in sending the bride something valuable or a document, declaring at the same time that he took her to be his wife. By this she became so far his wife that any breach on her part was punished with death.

⁵⁹ The Roman law punished this with infamy [l. 1, l. 13, *D. de his qui not. inf.*, 3, 2; Const. 18, *C. ad legem Jul. de adult.*, 9, 9].

⁶⁰ Roman law allowed an action for delay of marriage where without sufficient reason the delay extended over two or three years [Const. 18, *C. de episc. aud.*, 1, 4; Const. 2, 5, *C. de sponsal.*, 5, 1; Const. 2, *C. de reprod.*, 5, 17].

fraud be discovered after the marriage, an action for divorce can be entered.

If the betrothal be dissolved before marriage, either through the death of bride or bridegroom, or through withdrawal of both parties (*repudium voluntarium*), or through a delay on the part of the bridegroom's family for over five years, or through an impediment to marriage just arisen or only just discovered, then the presents have to be returned. If the marriage be not concluded, through the *repudium* of one party, the party innocent of the dissolution of the betrothal gets back or keeps the presents.

The fact of bride or bridegroom having been punished for theft or fornication gives a right to the other party to cancel the contract.

4.—CONCLUSION OF MARRIAGE.

"The ceremony of marriage," says the *Liki* [LEGGE, vol. II, p. 428], "was intended to be a bond between two [families of different] surnames, with a view, in its retrospective character, to secure the services in the ancestral temple, and, in its prospective character, to secure the continuance of the family line. Therefore the superior man set great value on it. Hence, in regard to the various [introductory] ceremonies,—the proposal with its accompanying gift [always a goose]; the inquiries about the [lady's] name; the intimation of the approving divination; the receiving the special offerings; and the request to fix the day;—these all were received by the principal party, as he rested on his mat or leaning-stool in the ancestral temple."

When the parties desire to conclude the marriage, presents of silks (納幣 *na-pi*, spoken of as 大禮 *ta-li*, the

great ceremony) are sent to the father of the bride, and a further document (禮書 *li-shu*, like the first one, also called 婚書 *hun-shu*, the horoscopes of the betrothed couple) passes.⁶¹ This is the marriage contract stipulating the sum for the bride, which sometimes amounts to thousands of taels. The marriage is therefore preceded by a purchase, which is no mere sham transaction like the Roman *coemptio*, but corresponds to the purchase of the ancient German laws and to that of the Jewish law.⁶² By accepting the purchase-money, the father⁶³ of the bride sells and manumits his daughter to the bridegroom's family, to which she henceforth belongs. Then a date is fixed (請期 *ch'ing-ch'i*, commonly called 送日 *sung-jih*, sending the day), and on that day the presents, together with her furniture, boxes of clothing, eatables, etc., are paraded through the streets to the bridegroom's house, and the bride herself is brought in a closed red chair with music to her new home, where she is personally welcomed (親迎 *ch'in-ying*).⁶⁴ The bride and bridegroom then kneel together before the ancestral shrine (拜堂 *pai-t'ang*, 拜天地 *pai-t'ien-ti*, to worship heaven and earth) of the latter's family. They next drink together the nuptial cup (盞 *chin*)—usually two cups tied together by a red string⁶⁵—and the marriage ceremony terminates (成禮 *ch'êng-li*).

⁶¹ The Jewish *kethubah* (בריתא *Tobias* 7, 14) and the Roman *conscriptio*, contained the obligations undertaken by the husband. The Roman contract itself was called *pactio nuptialis*, γαμικαὶ ἐγγυησεις, the document itself *tabulæ nuptiales*.

⁶² See MAYER, *l.c.*, II, p. 353.

⁶³ The Talmud says: The matrimonial purchase-money belongs to the father [MAYER, *l.c.*, II, p. 326].

⁶⁴ The conclusion of the Jewish marriage consists in the bride being led by the bridegroom into the nuptial chamber or being received into the bridegroom's house. The latter ceremony is to-day represented by the *chuppah* or canopy, under which betrothal and marriage are celebrated at the same time [vide M. SACHS, *Gebetbuch der Israeliten* (Breslau, 1892), p. 466].

⁶⁵ According to the *Liki* [LEGGE, vol. II, p. 429] two halves of a melon.—This bridal drink [Brauttrunk] was also known to the Germans [v. WEINHOLD, *Die deutschen Frauen im Mittelalter*, pp. 225, 264].

The wife leaves her family for ever (出家 *ch'u chia*)⁶⁶ and belongs to the family of the husband,⁶⁷ i.e., she considers the parents of her husband as her own, and mourns for them legally a longer time (three years) than for her parents (one year).⁶⁸

In China, then, the church has nothing to do with marriage; neither are the usual ceremonies and festivities absolutely necessary for the conclusion of a *justum matrimonium*, as long as the *consensus matrimonialis* exists between those persons who sign the marriage contract. In fact when the bride has been brought up in the family of her future husband, as sometimes happens,⁶⁹ the red chair and the parading of presents through the streets become useless.⁷⁰ But, like the Jews, the Chinese invite guests, relations, and friends,⁷¹ who keep up the festivities for three days. During these three days the bride is accompanied by bridesmaids (大妗 *ta-chin*), who constantly attend on her. A peculiar custom is the so-called brawl-room (鬧房 *nao-fang*). During the first three nights the newly married couple are constantly disturbed by practical jokes executed by relations (in some provinces even by complete strangers), everybody trying

⁶⁶ The same expression is used for a man who becomes a priest or a maiden who joins a nunnery.

⁶⁷ The Chinese custom requires a man to cleave to his father and mother and to compel his wife to do the same. Christianity by requiring a man to leave his father and mother and to cleave to his wife [Matth., 19, 5; Gal., 4, 22-28; Eph., 5, 31] has not expressed the popular sentiment and is not in accordance with Roman and modern law precepts. The beautiful words addressed by Ruth, the Moabite, to her Jewish mother-in-law Naomi [Ruth, 1, 16. Comp. 2 Sam., 15, 21] are often quoted in marriage sermons, but only mean that Ruth, the ancestress of the house of David, joins the Jewish faith.

⁶⁸ According to the Jewish law, the family of the mother is not called family [MAYER, *l.c.*, II, 283].

⁶⁹ See later on, under "Adoption."

⁷⁰ See SMITH, *Chinese Characteristics*, p. 116.

⁷¹ Thus giving due importance and sufficient publicity to the ceremony [Liki, I, p. 78 (LEGGÉ)].

to obtain clothes or other objects of necessity or value from the bridal chamber, which the bridegroom has to redeem on the following day with wine, cake, etc.

Marriage, therefore, as we have seen, is concluded in China by the will of the parties concerned being expressed in a public manner. So it was according to Roman law⁷² and, closely following it, the Canonical law,⁷³ until the *Concilium Tridentinum* (1545-63) introduced a formal act and made marriage a religious institution. This led to the doctrine of the indissolubility of the marriage bond, and the church arrogated to itself the exclusive right to decide in matrimonial cases. From that time began the differences between state and church which are only now on the point of being settled.

In the ordinary course of events the Chinese wife brings no dowry (嫁粧 *chia-chuang*, 粧奩 *chuang-lien*) to her husband. Still she may inherit, or she may be *sui juris* and possess money, land, or houses. In this case she can have her rights protected in the marriage contract.⁷⁴

Whilst the acquisition of a wife is called marriage (娶妻 *ch'ü-ch'i*, 成親 *ch'êng-ch'in*, 成婚 *ch'êng-hun*), the ceremonies of which have a sacramental character, the expressions for the acquisition of a concubine (立 *li* or 買 *mai* or 置 *chih* 妾 *ch'ieh*) point to the inferiority of the action. The union is concluded without music and without the red chair.⁷⁵ The punishment for transgressions against the marriage laws in

⁷² 1. 22, *C. de nuptiis*, 5, 4.

⁷³ Cap. I-X, *de spons. et matr.*, 4, 1.

⁷⁴ Compare the special dowry contract of the Romans, *pacta dotalitia* (the document itself being called *dotis tabula*). The Jews also mentioned the dowry (*nedunya*. Compare Ezech., 16, 33) in the *kethuba*; the dowry, whether consisting of movable or immovable goods, but in most cases comprising female slaves, was called *asón barzel* (*pecus ferreum*).

⁷⁵ The same with the Jews: wives with nuptials and with marriage contract, concubines (*pilegrah*) without either; the same with the Greek *πύλλαξ*; different, however, with the Roman *peller* [l. 144, *D. de verb. signif.*, 50, 16; Nov., 18, c. 5].

the case of a concubine are less severe than in the case of a wife.

Marriage is called 婚姻 *hun-yin*; to marry a husband is 嫁夫 *chia-fu* for wife and concubine alike (男婚女嫁 *nan hun nü chia*, the man marries, the wife takes a husband). [Compare the Italian *casare*].

5.—RELATION OF HUSBAND AND WIFE TO EACH OTHER.

Through the marriage the wife becomes, as was the case according to the law before Justinian,⁷⁶ not only *uxor* but comes also into the *manus mariti*. She ceases to be *sui juris*, if she ever was it, and leaves the *patria potestas*, if she stood under it.⁷⁷

It is in consequence of the way in which the wife comes into the power of her husband that she acquires very few rights with the marriage. Though she shares the rank and honours of her husband,⁷⁸ she has no right to demand conjugal fidelity from him,⁷⁹ whilst she, by sinning against it, commits a heinous crime.

It is a cause for divorce if the wife beats her husband [a case probably as rare in China as with us, and, when it happens, more likely to be quietly endured than brought into court], but the husband has the right to inflict corporal punishment on her. He is, however, punishable if by doing this he inflicts a wound; but he escapes with a fine if he and his wife are willing to be divorced.

⁷⁶ See MACKELDEY, *Lehrb. des röm. R.*, 14th ed., II, p. 266; compare *Gaji Instit.*, § 49, § 108 ss., II, § 86 ss.

⁷⁷ MACKELDEY, *l.c.*, II, p. 274, note; *Gaj. Inst.*, III, § 14, 24.

⁷⁸ As the Roman *uxor* shared the *dignitas mariti*.

⁷⁹ Unlike the Romans [*Nor.*, 117, c. 9, § 5: *liceat mulieri propter hanc etiam causam matrimonium dissolvere*]. In ancient times the Chinese husband's adultery was punished by castration (腐刑 *fu-hsing*).

The wife owes the husband implicit obedience, and is not allowed to leave the house without his permission. If she disobeys, her husband may sell her to another as a concubine.

The wife belongs to her husband's family even after his death;⁸⁰ if she leaves it, either to return to her own or to marry again, she has to leave behind her husband's estate, including what she brought with her. But her husband may have been the oldest member of his stock; in that case, after his death his power is transferred to his wife, and one not unfrequently hears of an old lady managing the family estate with only one son assisting her, the others living in other provinces and receiving their orders from her. After her death the family property is divided (分家產 *fēn chia ch'an*) amongst the sons, who then become *sui juris* and register themselves as new families or households (戶 *hu*).

The wife cannot possess property of her own as long as her husband lives; everything she possessed before entering into the *manus* passes into the hands of her husband,⁸¹ so that even property inherited by her remains with the husband after the marriage has been dissolved,⁸² unless it had been otherwise stipulated in the marriage contract. Although, therefore, the questions of *dos*, *paraphernæ*, *pacta dotalitia*, and *donatio inter virum et uxorem* do not really exist in Chinese law any more than they existed in the ancient Roman law, still a divorced wife or a widow will always take her jewellery and silks away with her. And it is in such that any *donatio* of the husband is invested.

⁸⁰ Similar to the Roman law [l. 22, § 1, *D. ad municip. et de incol.*, 50, 1: *vidua mulier amissi mariti domicilium retinet*].

⁸¹ See MACKELDEY, *l.c.*, vol. II, p. 275; *Gaj. Inst.*, II, § 86, III, § 82; *Ulp.*, XIX, § 18.

⁸² *Gaj. Inst.*, II, § 98: *si quam in manum ut uxorem recipimus, ejus res ad nos transeunt*.

The husband is not liable for debts contracted by his wife before marriage, unless she was *sui juris* and had no family when he married her.

If the husband changes his residence, the wife is obliged to follow him if he wishes it.⁸³ Poor people change their *domicilium* only to emigrate to another province; people of the better classes generally leave their first wife at home, to educate the children and to look after the family property, and take a concubine at the new place. The emigration of females to foreign parts is prohibited.

With all his power the husband is not allowed to hire out his wife to prostitution,⁸⁴ although it does occur that a man whose wife has not borne a son, and does not allow him to purchase a concubine, hires for a time the wife of another to get a son by her. This is unlawful and not considered decent.⁸⁵ But it is lawful for a man to enter into a contract with a widow and hire her for a certain number of years, until he gets a son by her. In this case the woman need not leave her former husband's family.

6.—DISSOLUTION OF MARRIAGE.

Marriage is naturally dissolved by the death of either husband or wife. Another cause for the dissolution is divorce.⁸⁶ This may be either enforced by law or be a voluntary act.

⁸³ The question is a disputed one with us [see DERNBURG, *l.c.*, vol. II, p. 10].

⁸⁴ The same in Jewish law [Lev., 18, 20].—In Rome *lenocinium facere* was punished with infamy [l. 1, l. 4, § 2, 3, *D. de his qui not. inf.*, 3, 2.—l. 43, § 6-9, *D. de ritu nuptiarum*, 23, 2].

⁸⁵ The Hindu in such cases will have recourse to "*nigaya*," *i.e.*, hand over his childless wife to another man to obtain a child. See STARCKE, *l.c.*, p. 142.

⁸⁶ 分家 *fēn chia*, 分妻 *fēn ch'i*, 分鬻 *fēn yüan*, which expressions are also used for a one-sided divorce, when the husband sends his wife away, the Greek ἀποπέμψις.

a.—A divorce *must* take place if there exists an impediment to marriage, or if the wife commits adultery. The husband has in the latter case the right to kill both adulterers, if he surprises them *in flagrante delicto*.⁸⁷ If he does not kill the wife, she is punished and sold as a concubine, the purchase-money for her being forfeited. If the adulterer kills the husband, the wife is strangled.⁸⁸

b.—A divorce may take place—

- 1.—If both husband and wife are willing to dissolve marriage (owing, *e.g.*, to incompatibility of temper).
- 2.—If the wife leaves the house against the will of the husband ;⁸⁹ should she marry whilst absent, she is strangled.
- 3.—If the wife beats her husband.
- 4.—If the marriage contract contained false statements.
- 5.—If the wife has one of the following seven faults : barrenness, sensuality, want of filial piety towards the husband's parents, loquacity, thievishness, jealousy and distrust, or an incurable disease.

The husband, however, is obliged to keep her in spite of one or several of the above-mentioned faults if she has kept the full term of mourning for three years after the death of

⁸⁷ Comp. Lev., 20, 10. The husband who kills both and thus maintains the purity of the family is invariably rewarded by the local official and praised by the people. A correspondent from Ts'ing-kiang-p'u describes such a case in the *North-China Daily News* of 19th Nov. 1894, and, evidently dissatisfied with the morality of the transaction, adds : "the most deplorable feature of the case is the fact of the official's letting the murderer go scot free, and public opinion justifying him fully in winking at such brutality."

⁸⁸ Compare l. 43, § 12, 13, *D. de ritu nuptiarum*, 23, 2.

⁸⁹ On account of the suspicion of adultery ; the Canon law required more than mere suspicion, *e.g.*, cap. 12 X, *de prægumptionibus* : witnesses who *solum cum sola, nudum cum nuda in eodem lecto jacentem ea ut credebant intentione, ut eam cognosceret carnaliter, viderunt*.

his parents; or if his family, having been poor at the time of the marriage, have since become wealthy; and, lastly, if the wife has no other relations to whom she may return after the divorce.

When the divorced wife leaves the house, the husband may give her a bill of divorce (休書 *hsiu shu*, 分書 *fên shu*), a specimen of which is printed in G. SCHLEGEL's *Woordenboek* [vol. I, p. 1053].

According to Roman law the action for divorce was a private one, open to wife and husband alike.⁹⁰ The Chinese wife may only bring an action if she thinks her husband is willing to give her her liberty, or if her husband has beaten her cruelly, or if she was deceived by false statements in the marriage contract, or if her husband was or has become a leper.⁹¹

The effects of the dissolution of marriage are the following: the marriage is considered as having never been concluded; the wife returns to her family, if the latter will receive her, the children remaining with the father, and the purchase-money being given back to the husband, except when the latter was the cause of the divorce. If the family will not receive her back, she becomes *sui juris*. All relationship through the wife ceases with the divorce.⁹²

A third way of dissolving a marriage is the official declaration of death, if the husband has absconded and has not been heard of for three years. The wife abandoned can

⁹⁰ l. 2, *C. de inut. stipulat.*, 8, 39.—l. 14, *C. de nuptiis*, 5, 4.

⁹¹ The Canon law has made marriage indissoluble [*Conc. Trid. sess.*, 24, *de sacramento matrimonii*, cap. 7. Compare also Matth., 19. 6]. During the so-called enlightenment of last century the facilities for divorce were carried almost as far as in China and had to be considerably reduced. In the United States the most frivolous rules as to divorce seem to exist, and it appears to be granted from arbitrary motives.

⁹² The same in Roman law [l. 3, § 1, *D. de postulando*, 3, 1.—*J. de nuptiis*, 1, 10].—The Canon law is of course different.

then demand such a declaration, especially if the family of her husband will not or cannot pay for her maintenance.

The time within which, after dissolution of marriage, a legitimate child can be born is fixed by Roman law at from 182 to 300 days, or 10 months, by modern legislation at from 210 to 302 days. In China a pregnant wife is rarely or never divorced, but after she has left the house of her husband for good the child she bears cannot be claimed by him.

7.—BIGAMY (雙室 *shuang shih*).

As before mentioned, the wife who maliciously leaves her husband and marries another during the lifetime of her first husband is strangled.

If the husband, in the lifetime of his first wife (妻 *ch'i*), marries another (妻 *ch'i*, not a concubine 妾 *ch'ieh*; he is allowed to have as many of the latter as he likes), the marriage is null and void; the wife returns to her family, and her father keeps the purchase-money, unless he knew of the existence of the first wife. In this case the money is forfeited.

A man who does double *sacra* is excepted (一子雙祧 *i tzu shuang t'iao*); his marriage with a second wife (妻 *ch'i*) is not considered bigamous.

8.—POLYGAMY AND POLYANDRY.

In ancient times we find no people strictly monogamous. Polygamy was universally practised, generally without distinction between the wives, but sometimes a kind of monogamy existed side by side with permitted polygamy, *i.e.*, one wife and several concubines. In this case the latter

were slaves and subjected to the wife.⁹³ Sensuality did not always lead to it, frequently the barrenness of the wife and the tendency to strengthen the family influence by having many sons was the guiding motive. Amongst the Jews it was an ancient custom which the Mosaic legislation neither cancelled nor sanctioned, expecting that time only could effect a change in a custom of such antiquity. In the Old Testament [Deut., 21, 15] it is rarely mentioned:— Abraham took Hagar as a concubine and divorced her when his wife bore a son.⁹⁴ But he had other concubines beside Hagar [Gen., 25, 6]. Jacob had two wives, Leah and Rachel, and besides two concubines, Bilha and Silpa, whose sons were all legitimate. Esau had many wives. King Solomon's polygamy, which probably sprung from his love of splendour, is severely censured [1 K., 11, 1. Comp. Matth., 18, 25; Luke, 1, 5].⁹⁵ In the 11th century polygamy was finally abolished, at least for the Jews in Europe, by R. GERSCHOM, of Worms, in consultation with several other authorities.

In China the case stands similarly. If the first wife is barren, a concubine is purchased, but almost always with the consent of the wife. Filial piety demands that the family be continued, so that there be worship at the ancestral graves.⁹⁶ The concubines stand under the authority of the wife, their children regard her as their mother, for whose death they go into mourning for three years. It is self-evident that this is only an external form and that a child will always love its own mother. The statement of

⁹³ See C. N. STARCKE, *l.c.*, p. 261.

⁹⁴ Ishmael was his legitimate son, and that Abraham, instigated by Sarah's jealousy, sent him away too, was wrong.

⁹⁵ In Talmudic times the concubine (*pilegesch*) was a legitimate wife, but without the contract (*kethuba*), given only to the first wife.

⁹⁶ *Meng-tz'ü*, IV, XXVI, 1 [LEGGÉ, II, p. 189]:—不孝有三無後爲大 *pu hsiao yu san wu hou wei ta* (having no descendants is the greatest of the three undutiful acts).

T. UNGER, in his book on marriage,⁹⁷ that the children of a concubine treat their mother with contempt, is based on some misunderstanding.

Amongst the lower classes in China polygamy is not the rule. In the better classes the first wife is frequently but slightly younger than her husband, and fades, in consequence of nursing her children too long—sometimes five or even six years,—earlier than her European sister. She remains at home to look after the children and the property, whilst her husband—official or merchant—is often absent for years. It is then that a concubine is taken, though rarely as long as the first wife is young.

Polygamy has been called the “fruitful source of so much anguish and death by suicide.” This is a sweeping statement. Most cases of polygamy occur in well-to-do families, whose means permit to them the maintenance of separate establishments for each wife, and the family life is not always disturbed.⁹⁸

Though undoubtedly a great evil, polygamy is so deeply rooted that reform cannot readily be effected. Even Christianity has no direct prohibition against it,⁹⁹ and Bishop COLENSO was of opinion that a convert with a plurality of wives was not required to put any of them away.¹⁰⁰

In Corea, where practically the same family laws are in force as in China, the children of concubines do

⁹⁷ *Die Ehe in ihrer welthistorischen Entwicklung*, quoted by C. N. STABCKE, *l.c.*, p. 158.

⁹⁸ Although a proverb says :—婢美妾嬌非閨房之福 *pi mei ch'ieh chiao fei kwei fang chih fu* (beautiful maids and lovely concubines are not a blessing of the ladies' apartments); or 娶妻娶德娶妾娶色 *ch'ü ch'ü ch'ü tê ch'ü ch'ieh ch'ü sê* (we marry a wife for her virtue, a concubine for her beauty).

⁹⁹ Only a bishop was required to be the husband of *one* wife [1 Tim. 3, 2; Tit. 1, 6, 7: *μίας γυναῖκος ἀνὴρ*.]

¹⁰⁰ Letter to the Archbishop of Canterbury: Cambridge, 1862.

not inherit the noble rank of their father (they are called *ilmiong*).

Polyandry, which has to be treated in this chapter, is in China proper found exclusively in the prefectural city of T'ing-chou (汀州府), in the province of Fukien, whose inhabitants speak the Hakka dialect. This polyandry of Fukien, carried by emigrants to Formosa, is of local origin, being caused by the extreme poverty of the above-mentioned district, in which, again, only the very poorest practise it. Here the brothers, who are the husbands of one wife, live with her alternately for some period. In the same place child murder is of common occurrence, so that infanticide and polyandry seem both to spring from poverty. McLENNAN asserts that infanticide took its rise from the nomadic life of the primitive hordes, and that polyandry was the natural consequence of it, because women were scarce [*Studies*, p. 131, 134]. This was certainly not the cause of the Fukienese polyandry.¹⁰¹

9.—SECOND NUPTIALS (媾 *kou*) AND VIOLATION OF THE TIME OF MOURNING.

After the death of the first wife, remarriage by the husband is permitted without any delay. The requirements of the household may often render it absolutely necessary. The widow, however, against whose remarriage custom is

¹⁰¹ Polyandry is practised in Tibet, Kunawar, and among the Todas [C. N. STARCKE, *l.c.*, p. 163]; it is described as follows:—Should there be more brothers, and they agree to the arrangement, the juniors become inferior husbands to the wife of the elder; all the children, however, are considered as belonging to the head of the family [see MOORCROFT & TREBEK, *Travels*, I, p. 321. C. N. STARCKE, p. 134].—C. R. MARKHAM [*Narrative of the Mission of George Bogle to Tibet* (London, 1876), p. 336] quotes HORACE DELLA PENNA [1780] as an authority for saying that the wife attributes the offspring to him by whom she says she was with child.

generally opposed, has to mourn three years for her husband, in which time she is not allowed to marry.¹⁰²

The widow of a man of rank is not allowed to marry again.

If the husband has left his wife, she may claim a divorce, or rather permission to marry again, but she has to wait for three years, as if the husband were dead.

A peculiar custom exists in some parts of China, *e.g.*, at Ningpo a marriage between a widow and a widower, usually both of advanced age, is concluded with the understanding that the widow belongs spiritually to her former husband, *i.e.*, when she dies her body is claimed by his family and is buried with him.

To marry a widow is called 娶後婦 *ch'u hou hun*, to take a second husband 改嫁 *kai chia*, or 反頭嫁 *fan t'ou chia*.

B.—ON PATRIA POTESTAS.

1.—GENERAL REMARKS.

As was the rule according to the Roman law of the time before Justinian, all persons who depend on a *pater familias*, either grandfather, father, uncle, mother, or husband, stand in China under *patria potestas*. Such persons are therefore either the wives of the *pater familias* or his sons

¹⁰² The Roman term of mourning ended after 10 months, the breach of which was punished [l. 1, C. 11, §1, and §3, *D. de his qui not. inf.*, 3, 2, *Nov.*, 22, c. 22]. The sense of cap. 5, X, *de secundis nuptiis*, 4, 21, is slightly different.

and daughters or more distant descendants on the male line, or slaves. The *patria potestas* is the same as the *domini potestas*, the power of the master over his slaves, according to the ancient Roman law.

The children of a *pater familias* are either legitimate or illegitimate.

If a man has got a girl with child, he must marry her ; if he has a wife already, he must take her as a concubine. But in any case, even if he is prevented by death from marrying her, the child is considered his legitimate offspring.

The master may dispose of the children of his slaves in marriage (主婚 *chu hun*), but has to obtain the consent of the child's parents if he wants to dispose of them in any other way.

Illegitimate children whose father is known but who are not made legitimate *per subsequens matrimonium* or adoption (私子 *ssü tzü*), and children of prostitutes (雜種 *tsa chung*, mixed seed, *vulgo quæsitæ*),¹⁰⁸ stand under the power of the mother, whose family name they bear.

Where many individuals of the same surname live close together a clan (族 *tsu* or *ts'u*) is formed with a patriarchal constitution, which consists of individuals, not of families. The oldest and most respected of the fellow-clansmen (族隣 *ts'u lin*, 族人 *ts'u jen*) is elected elder of the clan (族長 *ts'u chang*, 族老 *ts'u lao*, 族兄 *ts'u hsiung*). By him the genealogical register of the clan (族譜 *ts'u p'u*) is kept, and the ancestral temple of the clan is under his management. If the clan is poor, the elder determines the contributions for the spring and autumn festivals to be paid by each household, and divides the sacrificial meat (胙肉 *tsu jou*) amongst them. But frequently there is clan property (族田 *ts'u t'ien*), left by a wealthy clansman. In that case the different

¹⁰⁸ Compare the Jewish *mamzer*, *spurius*, *nothus*, the child of adultery or incest [Deut., 23, 3 ; Sach., 18, 6, bastard].

households have nothing to pay, and any surplus is divided amongst them. Sometimes there exist endowments for a clan school, and from them candidates of the clan who are successful at the public examinations receive handsome rewards.

Where a clan has thus been organised the greater part of the father's power passes into the hands of the clan elder. Meetings of the clan are frequently held, in which clan affairs, family questions, business matters, politics, etc., are freely discussed. Members of the clan who misbehave themselves are punished, a common punishment being to debar a man from joining in the ancestral worship and from sharing the sacrificial meat for the space of one year (停胙一年 *t'ing tsu i nien*). A more serious punishment is to be turned out of the clan altogether (出族 *ch'u ts'u*); but on those who continually disgrace the clan by crimes, capital sentence is passed and carried out by drowning (淹死 *yen ssü*) or by burying alive (活埋 *huo mai*).

The officials hardly ever interfere with clan decisions, but out of this *imperium in imperio* sprung during the Ts'in dynasty [秦 *ch'in*, 255-202 B.C.] a law called 夷三族 *i san ts'u*, by which the whole clan was made responsible for the crime of a single clansman. This law, to all appearances cruel and brutal, is after all but a natural consequence of the unity of the clan, claimed whenever it is advantageous to the clan interests. In modern times it is only applied in cases of rebellion, high treason, and similar crimes.

2.—ON THE RIGHTS OF BOTH PARENTS WITH REGARD TO THEIR CHILDREN.

The *patria potestas* over children, whether legitimate or adopted, is unlimited. The father (or after his death the

mother)¹⁰⁴ can do with them as he likes; he may not only chastise, but even sell, expose, or kill them.¹⁰⁵ The latter occurs often enough, especially with girls, if the family is too poor to bring them up. Infanticide is not prohibited, but whenever it spreads too far (especially in the province of Fukien)¹⁰⁶ the officials issue proclamations against it. Moreover, it is generally considered blameable, and the voice of the people is raised against persons who carry the abuse of the father's power thus far.¹⁰⁷

The power of the father over his son does not cease as long as the father lives, unless the son enters the government service,¹⁰⁸ when the father, desiring to exercise his rights over him, has first to obtain the consent of the Emperor.¹⁰⁹ Over the daughter the father's power exists until she comes into the *manus* of a husband.¹¹⁰ If her marriage is dissolved, she may return into the power of her father; as a widow, however, she remains in the family of her former husband.

The duty of the parents is expressed in the proverb
兒成雙女成對一生大事已完 *érh ch'êng shuang nû*
ch'êng tui i shêng ta shih i wan (when sons are paired and daughters mated the principal business of life is accomplished).

¹⁰⁴ Therefore not like *Gaj. Inst.*, I, § 104.—§ 10, *J. de adopt.*, I, 11: *feminæ—nec naturales liberos in sua potestate habent*; but the same as the law of the Visigoths, *MAYER, l.c.*, II, p. 416.

¹⁰⁵ The same power was given the father by the Romans [§ 2, *J.*, I, 9; *Gaj., Inst.*, I, § 55], by the Gauls [*CÆSAR, de bello Gall.*, VI, 19], and by the Visigoths [*lex Wisig.*, IV, 2, § 13], *MAYER, l.c.*, II, p. 416.

¹⁰⁶ Infanticide was not wholly suppressed in Guzerat [see SCHLAGINTWEIT, *Reisen in Indien, etc.* (Jena, 1869), I, p. 60].

¹⁰⁷ CH. PITON, *L'Infanticide en Chine*, Bâle, 1887.

¹⁰⁸ In publicis locis atque muneribus atque actionibus patrum jura cum filiorum qui in magistratu sunt potestatibus collata interquiescere paululum et connivere, etc. *AULUS GELLIUS, Noctes*, II, 2. See GIBBON, *Rome*, chap. XLV (ed. 1815), vol. 8, p. 54.

¹⁰⁹ The same according to the ancient German law [*MAYER, l.c.*, II, p. 443].

¹¹⁰ As in Jewish law [*MAYER, l.c.*, II, p. 440].

3.—ON THE RIGHTS OF THE HUSBAND WITH REGARD TO HIS WIFE.

The wife follows her husband wherever he likes to go, and may not leave the house against his will. The husband has the right to chastise her, but not to inflict a wound [see above, "Causes for Divorce"]. He has not the right to kill her, except where he surprises her *in flagrante delicto*.

He cannot, without sufficient reason, degrade his wife to the rank of a concubine. He may not hire her out to another man.

4.—ON THE DUTIES OF CHILDREN TOWARDS THEIR PARENTS.

As long as the parents are alive, it is the duty of the children to show them reverence and obedience (孝順 *hsiao shun*) and, if necessary, to nurse and support them.¹¹¹ The son shall, if father, mother, or grandparents are over eighty years old, or feeble and ill, remain at home,¹¹² unless another son over sixteen years old lives with them. Officials especially are bound by this command, but should anyone use this as a pretence in order to quit his post, he is severely punished.

¹¹¹ Filial Piety is called the fundamental virtue [*Lunyü*, I, 2. LEGGE, I, p. 2. See also E. FABER's *Systematical Digest*, and the essay "What is Filial Piety?" by various authors, in the *Journ. of the N.C.B. of R.A.S.*, vol. XX (1886), p. 115-144. Compare the Jewish *kibbud av naem*, reverence for father and mother].

¹¹² See *Lunyü*, IV, 19 [LEGGE, I, p. 35].

As long as parents, grandparents, or husband are in prison on account of a capital crime, the children, grandchildren, and wife are not allowed to participate in festivities and amusements of any kind. Disobedience towards parents or neglect to supply proper support is, on the motion of the parents concerned, severely punished¹¹³ by the officials.

Descendants are not allowed to enter an action against ascendants; they are not obliged to denounce crimes committed by them or to appear as witnesses against them, except in cases of high treason, rebellion, etc. This exemption extends to all members of the same household, even to servants and slaves.

In fact the whole of Chinese life is theoretically based on filial piety;¹¹⁴ on it the well-being of the family is built, and on this again society in general, and even the Empire itself, relies.¹¹⁵

After the death of the parents the descendants take their place and see that their memory is kept unsullied.¹¹⁶ It is their chief duty to strictly keep the term fixed for mourning and to rigorously perform the sacrificial ceremonies at the ancestral shrines and at the graves.¹¹⁷ The coffin has to be buried, if at all feasible, in the native soil,

¹¹³ According to Lev., 20, 9; Deut., 21, 20-21; 27, 16; Prov., 30, 17, even disrespect to parents was to be punished by death.

¹¹⁴ 萬善孝爲先 *wan shan hsiao wei hsien* (of all the virtues filial piety is the foremost).

¹¹⁵ Comp. Exod., 20, 15; Deut., 5, 16; see also PLATO, *opera* [ed. Didot] vol. II, p. 327; *Jalkut*, I, § 830: who has parents and does not reverence them has disgraced God.

¹¹⁶ The son is responsible for the father's debts to the amount of his inheritance, 父產子得父債子還 *fu chan tzü tê fu chai tzü huan*.

¹¹⁷ See *Lunyü*, II, 5 [LEGGE, I, p. 11].

and only then are the funeral ceremonies completed (成殯 *ch'êng lien*).¹¹⁸

All ancient nations regarded it as a sacred family duty to bury the dead with honours and to preserve their memory; filial piety towards the departed was considered a general duty of humanity (仁 *jén*).¹¹⁹ On the ideas of the Greeks and Romans, БОЕЦКН [*l.c.*, p. 422] says: the whole of the cult of the dead is based on belief in the immortality of the soul, which belongs to the highest antiquity. In the popular belief of the Greeks the souls of the departed were reduced to unsubstantial shadows through the Homeric conception of the world turned to a sensual life. In contradistinction to this, old cults were maintained, by which the dead were honoured as heroes and blessed spirits, as by the early Italians in the cult of the *dii manes*.

Belief in the immortality of the soul is very ancient, and with it came the natural wish to let the deceased participate in the family feasting; hence a cult of the dead sprung up.¹²⁰

The Egyptians held a similar belief.¹²¹ Just as uncivilised people of our times, especially on the Dark Continent, reverence their dead and believe in the invisible existence

¹¹⁸ The onerous nature of this duty may be gathered from the case of a former Customs Taotai of Shanghai, FENG CHÜN-KUANG (馮峻光), who in 1878 went as far as Kansu, in the north-west of China, to fetch the coffin of his father and to bring it overland to Canton, his native province. The difficulty of the voyage, on which many ceremonies had to be performed, exhausted the dutiful son to such an extent that he succumbed when only half the voyage was completed. His brother took his place and continued the voyage with the two coffins.

¹¹⁹ See БОЕЦКН, *Encycl. & Methodol. der philol. Wissenschaften*, 2nd ed. (Leipzig, 1886), p. 421.

¹²⁰ H. PAUL, *Grundriss der Germanischen Philologie* (1891-93), vol. I, p. 998.

¹²¹ H. BRUGSCH, *Die Ägyptologie* (Leipzig, 1891), p. 180.

of the departed and in their influence for good or evil on the surviving, so also with the Egyptians was the dead the subject of special reverence. In Egypt the cult of the dead was exaggerated. They believed in a second life, which was assumed to be on the pattern of the temporal. They gave the dead all sorts of things—in the beginning, perhaps, the proper ones, later on common and worthless imitations.

Dim and hazy as was the conception of a future life with the Greeks, Romans, and Egyptians, so is it with the Chinese. In fact, like the Egyptians, the Chinese consider the departed as taking the same interest in family matters as when alive, and serve them as such.¹²²

The religious belief of the Chinese is not very profound, and their worship at different temples is influenced not so much by a belief in the special efficacy of a particular idol as by the unpoetical hope of reward for offerings—all too charily made,—a hope somewhat akin to that of a man who stakes his money—and his faith—on a number in a lottery. In this sense they believe that the invisible spirits of the departed are hovering round their old homes and may benefit those who appeal to them, but might also be revenged on those who disregard and neglect them. Filial love is the moving spirit; habit and an indistinct fear are, however, closely allied with it.

This cult of the dead has been called Ancestral Worship, and stamped as idolatrous by the decennial Missionary Conference of 1890.

Now what is this cult?

Each Chinese house contains an ancestral shrine (祧 *t'iao*, 家祠 *chia ssü*, 家堂 *chia t'ang*), in which the wooden tablets of the ancestors (神牌 *shén p'ai*, 神主 *shén chu*, 神木 *shén mu*, also called 家神 *chia shén*) are placed, with the names, rank, and dates of birth and decease of the various ascendants

¹²² See *Liki* [LEGGE, II, p. 311].

inscribed thereon. Before these incense is daily offered with prostrations (拜 *pai*), and twice a month offerings of eatables are spread, again with prostrations. Besides this house-shrine, each clan possesses an ancestral temple (宗廟 *tsung miao*), in which also tablets are placed, either of wood (神木 *shén mu*) or of stone (神柱 *shén chu*).¹²³ In spring and autumn periodical rites are performed by the clan, accompanied by sacrifices of meat (胙 *tsu*), at this temple, together with ceremonies at the graves of the ancestors.

Ancestral Worship is called 拜神¹²⁴ 主 *pai shén chu*, to “*pai*” the tablet of a deceased parent or ancestor, or 拜祖宗 *pai tsu tsung*, to “*pai*” the ancestors. 拜 *pai* means [GILES] to pay one's respects to, to make obeisance, to worship, to visit (e.g., 拜客 *pai k'ò*, to make calls). All family affairs should be announced (告 *ku'*) to the spirits [see *Liki*. LEGGE, I, p. 78] and their blessing invoked (祝宗 *chu tsung*). The offerings (祭祀 *chi ssü*) should be made in a sincere spirit to all ancestors, however remote (祖宗雖遠祭祀不可不誠 *tsu tsung sui yüan chi ssü pu k'ò pu ch'êng*).

At the Ch'ing-ming festival,¹²⁵ in the spring, the ancestral graves are visited and swept (拜墳 *pai fên*, 拜掃 *pai sao*).¹²⁶ Then meat is offered (胙 *tsu*), and paper money (金銀紙

¹²³ For an illustration of their arrangement, see *China Review*, vol. IV (1875), p. 296.

¹²⁴ 神 *shén*, spirits, gods, divine, supernatural, mysterious [GILES], should, on account of the use of the word in the sense as here, never stand for God. That this is the true and only standpoint to take the author endeavoured to show in the *China Review* [vol. VI (1877), p. 273] by translating the articles on 上帝 *shang-ti* and 神 *shén* from the great Manchu Dictionary, the highest authority on the point, having been published with Imperial assistance. The term *shang-ti* exactly corresponds to the Hebrew *El 'eljôn* in Genesis, *ὁ ὑψιστος Θεός*.

¹²⁵ 清明, one of the 24 terms into which the year is divided, the 16th of the 2nd moon, about March.

¹²⁶ Greeks and Romans also honoured the memory of the dead by periodical sacrifices at the graves [BOECKH, *l.c.*, p. 422].—The Jews also have a yearly visit to the grave, the so-called “Jahrzeit.” Their service in memory of the dead (*hazkarat neshamot*) is part of their synagogical liturgy. The All Souls Day of the Church is the same, when supplications are made for the souls of the faithful deceased.

chin yin chih) and different articles for the use of the departed, also made of paper, are burnt in front of the tombs (墳前燒紙 *fen ch'ien shao chih*).¹²⁷ The following is a prayer recited on this occasion: We have come to sweep your tomb, to show our gratitude for your protecting care, and now we beseech you to accept our offerings and make our posterity prosperous and happy.¹²⁸

A funeral repast, at which the sacrificial meat is eaten, concludes the ceremony.¹²⁹

This, then, is the form the so-called Ancestral Worship takes in China. The subject in its bearing on Christian converts was first discussed as early as the 17th century. The Jesuits saw nothing idolatrous in this form of worship, and, perceiving the strong hold it had taken on the Chinese mind, allowed their converts to continue its practice. Christianity was then on the point of conquering China. Subsequently rival sects set up a cry and accused the Jesuits of too great leniency towards heathen practices. Pope and Emperor were appealed to. The former at last gave a final verdict against ancestral worship, which the Emperor resented; in consequence of this dispute the cause of Christianity was blighted. The Roman Catholics have ever since disallowed ancestral worship.

The Protestant missionaries have for a long time been in doubt about this cult. Many voices had already been raised against it, when at the last Missionary Conference (1890)

¹²⁷ The heathen custom of burning clothes and other articles at the funeral of the dead was permitted to the Jews, as this custom is also mentioned in the Bible [see Sanhedrin, p. 52b]; it is called "*serēphah*" [see HAMBURGER, *Suppl.*, II, p. 83]. It was evidently an old Egyptian rite [see BEUGSCH, *l.c.*, p. 180]. One of the oldest customs of all Germanic tribes was to place in the tomb of the dead something which had been treasured or regarded as indispensable by him while living [see H. PAUL, *l.c.*, vol. I, p. 999]. Even in this century it is customary in Sweden to place in the coffin tobacco-pipes, knives, and even a full bottle of whisky [WEINHOLD, *Alt nord. Leben*, p. 493. H. PAUL, *l.c.*, vol. I, p. 1000].

¹²⁸ W. A. P. MARTIN, *Hanlin Papers*, Second Series (1894), p. 846.

¹²⁹ See H. PAUL, *l.c.*, vol. I, p. 998.—The idea that the dead invisibly participate in the meal we find everywhere. Compare the Irish wakes.

the question was put to the vote and it was decided "that this Conference affirm the belief that idolatry is an essential constituent of ancestral worship." The Conference condemned all idolatrous customs, all customs that recognise any being as worthy of worship aside from the true God. Dr. YATES, a well-known missionary, says [p. 612] that three evils come from ancestral worship :—

- 1.—"Betrothal of children at an early age, by which millions are made miserable for life."

Now it is well known how much our line of thought is influenced by general custom. What appears to us as want of freedom and even severity does not appear so to the Chinese mind. The Chinese consider marriage as a business, in which the erotic element need not enter at all or is perhaps considered troublesome. This was also the view taken in Europe in former ages¹⁸⁰ and the betrothal of children was a common practice. The romantic love in marriage is a thing of modern times. But even now it is not considered a necessary factor ; equal aims and equal interests are more conducive to a happy union than mere love.

We cannot hold ancestral worship responsible for early betrothals.

- 2.—"Polygamy, the fruitful source of so much anguish and death by suicide."

Polygamy, as we have already said, is certainly an evil, but it is still practised by the great majority of mankind. "Anguish and death by suicide," said to be provoked by polygamy, are, in my opinion, not of frequent occurrence in China, because the evil is firmly established and the Chinese woman hardly considers it as baneful. In the majority of cases, but not in all, barrenness of the wife and the desire to have children lead to polygamy. Love of splendour, the wish to have a large family (and

¹⁸⁰ PAUL, *Grundriss*, vol. II, 2, p. 217.

hence greater influence), and carnal considerations have as much to do with it as ancestral worship. But before we judge others, ought we not to inquire into our own position? Have we realised the ideal of marriage of one man with one woman? or have we, to use the words of a modern author, rounded Seraglio Point, but not passed Cape Turk yet?

3.—“The heavy tax in support of this worship.”

The daily expenditure of 360 millions in joss-sticks alone¹³¹ certainly comes to a respectable total at the end of the year, and the spending of so much money may be called an utter waste, but it can hardly be called an evil, and is not a heavy tax on the individual.

A paper by Dr. MARTIN [*Record of Conf.*, pp. 619-631] pleads for tolerance; Dr. H. BLODGET [*ib.*, pp. 631-654] condemns ancestral worship as antagonistic to Christianity; Dr. E. FABER has given a concise and terse *résumé* of the whole question [pp. 654-655].

Now religious Conferences and Councils have invariably been failures when absolute truth was to be ascertained, and I am afraid this last Conference was no exception to the rule. It is more than doubtful whether idolatry is really an essential constituent of ancestral worship. Idolatry is “the worship of idols, images, or anything made by hands, or which is not God” [Webster]. If the Chinese “worship” their dead as idols, they also worship their living parents in the same way, for the ancestral rites are but a continuation of the filial love shown to the living. In such rites there is no “worship” in our sense of the term, and by substituting “cult” the baneful spell of the word is broken.

Ancestral worship is only external religion, but it has taken deep root in the hearts of the Chinese. Only thorough teaching can undermine it. A true convert to Christianity

¹³¹ As W. WILLIAMS [*Middle Kingdom*, vol. II, p. 279] has done; he computes the yearly expenditure at one dollar per head.

will soon give up the superstitions closely connected with ancestral worship, and we have for this a good example in the Chinese Mohammedans, who with their better creed soon gave up the superstitious practices. The early church acted more wisely than our modern missionaries, for old customs which appeared dangerous to the new creed, but the sudden prohibition of which would have been unwise, were changed into Christian festivals. England and Germany offer many examples of this practice [comp. BEDA, *Hist. eccl.*, I, 30, ed. HOLDER].

The difference between the sacrifices to God and those offered to ancestors is well drawn in the *Liki* [LEGGE, vol. I, p. 413]:—"In the sacrifice to God we have the utmost expression of reverence, in the sacrifices of the ancestral temple we have the utmost expression of humanity."

In India a somewhat similar cult of the dead existed,¹³² but as to its present state I have no authorities.

5.—ACQUISITION OF PATRIA POTESTAS.

Patria potestas may be acquired (a) through marriage, (b) through procreation, (c) through adoption, and (d) through purchase, the last method differing in nowise from (a) and (c). If the person who acquires *patria potestas* in one of these four ways stands himself under *patria potestas*, then he acquires it for his *pater familias*:—

(a.) *By Marriage*.—The wife belongs after marriage to the family of her husband, and stands in his *manus* or in the *patria potestas* of that person under whose *patria potestas* the husband stands.

(b.) *By Procreation*.—Children come under the *patria potestas* of their father, whether born by a wife or by a concubine.

¹³² W. CALAND, *Altindischer Ahnencultus*. Das Çhadda, nach den verschiedenen Schulen dargestellt. Leiden, 1893.

(c.) *By Adoption*.—To explain this institution, most important in Chinese law, we take the Roman law as a type.¹³³

A man may adopt a person as son or daughter, or, if he formerly had sons, as grandchild, but not as brother, wife, or concubine.¹³⁴ In China nearly all adoptions take place in childless families, and among these the greater part are adoptions of sons. Five per cent of all families in China possess adopted children [E. H. PARKER].¹³⁵ What is said with regard to adoption among the ancient Greeks holds good for the Chinese:—The dying out of a family was to be prevented, as by the desolation of the house the dead lost their religious honours, the gods of the family their sacrifices, the hearth its flame, and the forefathers their name among the living.

The oldest recorded instance of adoption in China is that of SHUN being received into the family of Emperor YAO [2200 B.C.]

Adoption, like marriage and the acquisition of slaves, rests in China upon purchase, concerning which a contract is made, with the difference that the word "wife," "son," "daughter," or "slave" is specifically mentioned in it. The most frequent case is the adoption of a nephew by a childless uncle. This nephew is generally a younger son, who then leaves his father's family and his son becomes the grandson of the adopting uncle. If there is only one nephew whose duty it is to continue the line of his father, he has to marry another wife (妻 *ch'i*), whose male issue is considered that of the uncle. The nephew has thus to perform double *sacra* and is called "one son with two ancestral halls" (一子雙祧 *i tzu shuang*

¹³³ G. JAMIESON, "The History of Adoption and its Relation to Modern Wills" [*China Review*, XVIII (1889), pp. 137-146].

¹³⁴ Compare *l. 37, pr. D. de adopt.*, 1, 7.

¹³⁵ Compare the law of *Mann*, IX, 127, 159: the Hindu considers it a religious duty to have a son, by whose means he may pay off his debt to his forefathers. If without offspring he must adopt a child.

t'iao). He mourns the three years' term for his adoptive father and only one year for his parents. If he leaves only one son, the latter has, like his father, to marry two wives; the issue of the one is that of his grandfather, that of the other continues the uncle's family. When two sons are obtained the ancestral hall is completed (成祧 *ch'êng t'iao*). This, then, constitutes the only case where a Chinese may have two wives (妻 *ch'i*) at the same time.

Where there is no son or nephew, but only a daughter, a son-in-law may be taken into the family, who leaves his own family without being actually adopted. This is called 招婿 *chao hsi*, inviting a son-in-law.

It being prohibited in China for officials to hold office in their native province, adoption becomes the means of avoiding this restriction. The official in question is adopted into a family of another province, acquires thus a right of domicile (*chi* 籍) in the province of his adopted parents, and may now hold an office in the province originally his native one. In the same way confiscation of property is prevented by adoption, if such confiscation is imminent on account of the crimes of near relatives.

The general reason for adoption is to continue the stock, 接宗子 *chieh tsung tzu*. Adoption of agnates is called 承繼 *ch'êng chi* (taking over the succession), 過嗣 *kuo ssü* (going over to be heir), or 過祀 *kuo ssü* (going over to the *sacra*). There is a distinction between this and the adoption of a stranger:—義子 *i tzu* (or 女 *nü*) and 契子 *ch'i tzu* (or 女 *nü*) godchildren or *filii lustrici*, or 養子 *yang tzu* (rearing a child). As long as the former is possible, few will resort to the latter fiction. The adoption of cognates is called 歸宗 *kuei tsung* (returning to the stock).

A.—General Requirements of Adoption.

As the main idea of Chinese adoption, it may be stated

that only children out of families who bear the same family name may be adopted, as otherwise, according to the Chinese, the difference between families would soon cease to exist.

No special requirements are prescribed for the adopter, and the law fixes no age limit under which one may not adopt,¹³⁶ although it is usual for the adopter to be older than the person to be adopted. Foundlings under three years' old may be adopted without further ceremony.

An adopter may emancipate the adopted, and adopt him a second time.¹³⁷

The wife, acquiring after the death of her husband his *patria potestas*, has therefore the right of adopting;¹³⁸ she has, however, to ask the consent of the nearest male relation of her late husband, for adoption as well as for *datio in adoptionem*. She has further the right of preventing the legitimate or adopted sons of her former husband from giving themselves into arrogation against her wish.

The adoption of one's younger brother or one's uncle, even if the latter is younger than the nephew, is not allowed; for the same reason the uncle may not adopt a nephew who is older or of the same age as himself.

An interesting case is that of a foreigner desiring to adopt the two illegitimate children he had by a Chinese woman who had subsequently absconded. According to the law of his

¹³⁶ As is the case in Roman law [§ 4, *J. de adopt.*, 1, 11: *minorem natu non posse majorem adoptare placet; adoptionem enim naturam imitatur et pro monstro est, ut major sit filius quam pater. Debit itaque is qui sibi per adoptionem vel arrogationem filium facit, plena pubertate, id est xviii annis præcedere. L., 40, § 1, D. de adopt.*, 1, 7].

¹³⁷ Not so in Roman law [*L.*, 37, § 1, *D. de adopt.*, 1, 7: *eum quem quis adoptavit emancipatum vel in adoptionem datum iterum non potest adoptare*].

¹³⁸ The same in ancient Egypt [see MAYER, *l.c.*, II, p. 427], but not so in Rome [§ 10, *J. de adopt.*, 1, 11: *feminae quoque adoptare non possunt. Const., 5, l. de adopt.*, 8, 48: *mulierem quidem quæ nec suos filios habet in potestate, arrogare non posse certum est*].

country he could only legitimise his children, so long as their mother was living, by *subsequens matrimonium*. This was impossible, as the woman could not be found. The Chinese authorities were then asked to allow these children to take the foreign nationality of their father; and after obtaining this permission, the children were adopted by the father.

B.—*Special Requirements of Adoption and Arrogation.*

Whoever wants to give himself into arrogation must ask for the consent of the nearest relations of his former *pater familias*. If he has elder brothers alive, their consent also must be asked. In the lifetime of his father the son may give himself into arrogation, even without the consent of his father or his relations, if the father is insane and poor, so that the son by the arrogation acquires the means of supporting him. If the father is far away the son is allowed to be arrogated, but the father may, on his return, claim back his son.

According to its nature, the *datio in adoptionem* is, properly speaking, a sale (*venditio*), to which only the consent of the *pater familias* is required; the person to be adopted is not asked except he be a son holding office. In practice, however, it never happens that an adult married son is sold into adoption against his own free will. The wife of the adopted follows her husband, but the children remain in the family of the *pater familias*.¹³⁹

A man having sons of his own may not adopt a stranger as their elder brother, but he may adopt grandchildren, as

¹³⁹ According to Roman law the children of an arrogated person followed their father, while the children of an adopted person remained with their grandfather [C. 2. § 2, *D. de adopt.*, 1, 7: is qui liberos in potestate habet, si se arrogandum dederit, non solum ipse potestati arrogatoris subicitur, sed et liberi ejus in ejusdem fiunt potestate tamquam nepotes. *L.*, 40, *pr. D. de adopt.*, 1, 7: quod non similiter in adoptione contingit, nam nepotes ex eo in avi naturalis retinentur potestate.—*L.*, 26, 27, *D. ibid.*: ex adoptivo natus adoptivi locum obtinet in jure civili].

sons of his legitimate or adopted sons. After his death the latter have the right to dissolve such adoptions.

Brothers may, after the death of their parents, give their elder or younger sisters into adoption, but not without the consent of the latter.

Even after death a *filius posthumus* may be adopted for a man by his relations or friends, in case he died without any male descendants; preference is given, in such cases, to a nephew of the deceased. By special grace the Emperor may do this for princes of the blood or high dignitaries, but in all cases with the consent of the male relatives of the deceased.¹⁴⁰ By this means the levirate, as stated above, becomes unnecessary.

C.—*Effects of Arrogation and of Adoption.*

In China the effects are in either case the same.¹⁴¹ The adopted becomes agnate of all agnates of the arrogator or of the adopter. Altogether, the adopted son (or daughter) has a better position than the natural one, as he cannot be sold without the consent of his natural parents, unless a second adoption be of real benefit to the child. He has all the rights of a son (or daughter). In the case of inheritance, natural as well as adopted sons take precedence of all daughters.¹⁴² Should the adopter have sons born after the adoption, so that the original cause for the adoption no longer exists, he may cancel the adoption, if the parents are willing to take back the child. The child, however, must be kept if no member of his family lives to whom he can return; only officials may thus be left without family.

¹⁴⁰ This adoption after death was also known to the Greeks [see MAYER, *l.c.* II, 429, who quotes Demosth. and Isæus].

¹⁴¹ Not so in Roman law [l. 1, l. 23, *D. de adopt.*, 1, 7.—§ 2, *J. de adopt.*, 1, 11.—Const. 10, *pr.*, § 5, *C. de adopt.*, 8, 48.—§ 13, *J. de hered.*, 3, 1].

¹⁴² See CH. ALABASTER, "The Law of Inheritance," *China Review*, vol. V (1876), pp. 191-195.

The adopted child being regarded as the real child of his adopted parents, these must give their consent if the child wants to commence a three years' mourning after the death of his natural parents. An official is not allowed to mourn two terms of three years, but only one term for his adopted father, as mourning means in this case withdrawal for the time from official life.

6.—TERMINATION OF THE PATRIA POTESTAS.

With the death of the father his power passes to the mother, and after her death to the eldest son, who then has also power over his younger brothers and elder and younger sisters.

The father's power does not cease throughout his lifetime, except with his own free will or where the son holds office. Unless with the special permission of the Emperor, the father cannot in the latter case exercise power over his son. As already mentioned, the son becomes *quasi sui juris* if the father is insane and at the same time poor.

Excepting where the father gives himself into arrogation, so that his children come under the power of his arrogater, the father's power may cease with his will :—

- 1.—By sale into adoption, by which the son acquires agnate rights in the family of his adopted father.
- 2.—By sale of a daughter into marriage, she becoming an agnate in her husband's family and entering his *manus*.
- 3.—By permission to the children to enter a religious order. They then lose their family name and leave the family connexion altogether (出家 *ch'u chia*).
- 4.—By exposing the children in tender age. The finder may lawfully adopt them if under three

years of age.¹⁴³ If older, they are not allowed to be exposed, and only the ways mentioned under No. 1 and No. 3 are left to the father to rid himself of his child.

In contradistinction to the Roman law,¹⁴⁴ the father may relinquish his power even against the wish of his children.

An emancipation in the Roman sense, by which the emancipated person becomes *sui juris*, does not exist in China. After the death of the father the daughter becomes *sui juris*, if a widow and having sons, the son only in case he has a family.

C.—ON GUARDIANSHIP.

If at the time of the parents' death the children are still very young (under seven years), and no head of the family exists who has *ipso jure* a right to the *patria potestas*, the father's power devolves upon one of the male relations of the same surname (同姓親戚 *t'ung hsing ch'in ch'i*), if no *testamentaria tutela* has been ordered. If no such relation exist, then one among the male relations of a different surname (外姓親戚 *wai hsing ch'in ch'i*) is chosen. To be without any such relationship is in China an impossibility. If after the father's death no relation is willing to take the responsibility of the *patria potestas* upon himself, such guardian has to be appointed (託孤 *t'o ku*, to confide an orphan to any one, 受託孤者 *shou t'o ku ché*, a guardian).

¹⁴³ Const. 2, 4, *C. de infant. expos.*, 8, 52. Nov. 153, c. 1 (non gloss.).

¹⁴⁴ Nov., 89, c. 11, *pr.*: *solvere jus patriæ potestatis invitis filiis non permissum est patribus.*

The guardian has the full *patria potestas* and, like the father, retains it, with the above-mentioned exceptions, as long as he lives. The property of the child, of which the guardian has the full usufruct, continues to be the child's.

When a widow remarries, the children by her first husband come under the power of the second. But if a son of her first husband returns, with the consent of the second husband, to his father's family (孤子歸宗 *ku tzü kuei tsung*, an orphan returning to his ancestors), a guardian has to be appointed.

Between *tutor* and *pupilla* a marriage is impossible; it would be considered incestuous.

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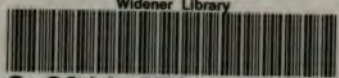
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